

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 02-31000

COY LEE McCARTER
SUSAN RYMER McCARTER

Debtors

**MEMORANDUM ON ADEQUACY OF
DEBTORS' AMENDED DISCLOSURE STATEMENT**

APPEARANCES: KITE, BOWEN & ASSOCIATES, P.A.

Craig J. Donaldson, Esq.
Post Office Box 4791
Sevierville, Tennessee 37864
KALBIAN HAGERTY, L.L.P.
James R. Hagerty, Esq.
2001 L Street, NW, Suite 600
Washington, D.C. 20036
Attorneys for Debtors

BURNETTE, DOBSON & HARDEMAN

Kent T. Jones, Esq.
713 Cherry Street
Chattanooga, Tennessee 37402
Attorneys for John W. Holden, Jr. and Ken Rayburn

JOE FOREST JUSTICE, III
222 Lexington Place
Sevierville, Tennessee 37862
Pro Se Creditor

WOOLF, McCLANE, BRIGHT, ALLEN
& CARPENTER, PLLC
Gregory C. Logue, Esq.
900 Riverview Tower
900 S. Gay Street
Knoxville, Tennessee 37902-1810
Attorneys for Commercial Bank

RICHARD F. CLIPPARD, ESQ.
UNITED STATES TRUSTEE
Patricia C. Foster, Esq.
800 Market Street, Suite 114
Knoxville, Tennessee 37902
Attorneys for United States Trustee

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Presently before the court is the adequacy of the Disclosure Statement for Second Amended Plan of Reorganization Dated April 3, 2003, Proposed by the Debtors Coy Lee and Susan Rymer McCarter and the amendments thereto as modified¹ (collectively, Second Amended Disclosure Statement). Objections to the Second Amended Disclosure Statement's adequacy were filed by the United States Trustee, the Internal Revenue Service, John W. Holden, Jr. and Ken Rayburn, Commercial Bank, and Joe Forest Justice, III (Justice). A hearing to consider the adequacy of the Second Amended Disclosure Statement and the objections thereto was held on April 17, 2003.² The court took this matter under advisement for ruling without further hearing.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (O) (West 1993).

I

On April 3, 2003, the Debtors filed the Second Amended Disclosure Statement, along with the Debtors' Second Amended Plan of Reorganization (Second Amended Plan). On April 11, 2003, Justice filed an "Objection to Second Amended Disclosure Statement for Second Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code Coy Lee McCarter and Susan Rymer McCarter" (Objection).

¹ On April 16, 2003, the Debtors filed their Amendments to Disclosure Statement for Second Amended Plan of Reorganization Dated April 3, 2003, Proposed by the Debtors Coy Lee and Susan Rymer McCarter. Additionally, on May 1, 2003, they filed their Supplement to Disclosure Statement for Second Amended Plan of Reorganization Dated April 3, 2003 Proposed by the Debtors Coy Lee McCarter and Susan Rymer McCarter.

² The United States Trustee filed a Withdrawal of U.S. Trustee's Objection to Debtors' Second Amended Disclosure Statement on May 7, 2003. On April 17, 2003, the Internal Revenue Service filed its Withdrawal of United States's Objection to Adequacy of Debtors' Disclosure Statement for Second Amended Plan of Reorganization Filed April 3, 2003. Commercial Bank announced that it was withdrawing its objection and John W. Holden, Jr. and Ken Rayburn acknowledged that their objection was grounded on confirmation issues rather than adequacy issues. The court will accordingly overrule the later two objections without further discussion.

As the foundation for his Objection, Justice asserts that (1) the Second Amended Plan fails to satisfy the confirmation standards of 11 U.S.C.A. § 1129(a) (West 1993 & Supp. 2003); and more specifically, (a) that it does not comply with the applicable provisions of title 11 as required by § 1129(a)(1); (b) that it was not proposed in good faith as required by § 1129(a)(3); (c) that it does not meet the requirements of § 1129(a)(6) regarding approval of any governmental regulatory commission of any rate changes proposed in the plan; and (d) that, in violation of § 1129(a)(11), it is likely to be followed by either a liquidation or further financial reorganization of the Debtors; (2) the Debtors have provided misleading, inaccurate, and materially incorrect descriptions of their business situation; (3) the Second Amended Disclosure Statement contains inaccuracies, partial truths, and material omissions regarding relevant events both pre-petition and post-petition; (4) the resort analysis provided by the Debtors is confusing and unintelligible; (5) the Debtors purposely misspelled Justice's name and gave a phony address on their schedules so that he would not be allowed to participate in the bankruptcy process as a creditor; (6) the Debtors failed to include as an asset of their bankruptcy estate their ownership interest in Echota Resort, LLC, as well as their receipt of payments and other benefits from Timothy Sievers for the purchase of this entity's assets to form a new company called Echota Smoky Mountain Resort, LLC, and their ownership interest therein; (7) the Second Amended Disclosure Statement does not contain required information regarding (a) a description of the available assets and their values; (b) the accounting and valuation methods used to produce the financial information in the Second Amended Disclosure Statement; (c) any financial information, valuations or pro forma projections that would be relevant to determinations of whether to accept or reject the plan; (d) information relevant to the risks being

taken by the creditors and interest holders; (e) the existence, likelihood, and possible success of nonbankruptcy litigation; (f) the Debtors' relationship with their affiliates; (g) the future management of the Debtors; (h) the sources of information stated in the Second Amended Disclosure Statement; and (i) the estimated administrative expenses, including attorneys' and accountants' fees; and (8) the Debtors have not met their burden of proof that they have complied with state laws governing corporations and real estate licensing.

II

The filing of disclosure statements is governed by 11 U.S.C.A. § 1125(b), which provides:

An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

11 U.S.C.A. § 1125(b) (West 1993). As it pertains to § 1125, subsection (a) provides the following definitions:

(a) In this section—

(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan; and

(2) "investor typical of holders of claims or interests of the relevant class" means investor having—

- (A) a claim or interest of the relevant class;
- (B) such a relationship with the debtor as the holders of other claims or interests of such class generally have; and
- (C) such ability to obtain such information from sources other than the disclosure required by this section as holders of claims or interests in such class generally have.

11 U.S.C.A. § 1125(a) (West 1993).

The court must determine adequacy on a case-by-case basis. *In re Scioto Valley Mortgage Co.*, 88 B.R. 168, 170 (Bankr. S.D. Ohio 1988). Although a non-exhaustive list, most courts consider the following factors in making their determination of adequacy:

- (1) the circumstances that gave rise to the filing of the bankruptcy petition; (2) a complete description of the available assets and their value; (3) the anticipated future of the debtor; (4) the source of the information provided in the disclosure statement; (5) a disclaimer, which typically indicates that no statements or information concerning the debtor or its assets or securities are authorized, other than those set forth in the disclosure statement; (6) the condition and performance of the debtor while in Chapter 11; (7) information regarding claims against the estate; (8) a liquidation analysis setting forth the estimated return that creditors would receive under Chapter 7; (9) the accounting and valuation methods used to produce the financial information in the disclosure statement; (10) information regarding the future management of the debtor, including the amount of compensation to be paid to any insiders, directors, and/or officers of the debtor; (11) a summary of the plan of reorganization; (12) an estimate of all administrative expenses, including attorneys' fees and accountants' fees; (13) the collectibility of any accounts receivable; (14) any financial information, valuations or *pro forma* projections that would be relevant to creditors' determinations of whether to accept or reject the plan; (15) information relevant to the risks being taken by the creditors and interest holders; (16) the actual or projected value that can be obtained from avoidable transfers; (17) the existence, likelihood and possible success of non-bankruptcy litigation; (18) the tax consequences of the plan; and (19) the relationship of the debtor with affiliates.

See Scioto Valley Mortgage Co., 88 B.R. at 170-71 (citations omitted). In short, a proper disclosure statement must clearly and succinctly inform the average unsecured creditor what it is

going to get, when it is going to get it, and what contingencies there are to getting its distribution.” *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991). Generally, other issues are left for confirmation; however, it is sometimes appropriate to find a disclosure statement inadequate when “it describes a plan of reorganization which is so fatally flawed that confirmation is impossible.” *In re Cardinal Congregate I*, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990).

III

The Debtors and Justice are former business associates. In his Objection, Justice makes several accusations that the Debtors have not filed their plan in good faith and that they are attempting to use the bankruptcy court as a “mechanism to obstruct, delay and ultimately not pay [their] creditors.” Additionally, he takes offense at representations made by the Debtors to the court regarding Justice’s involvement with the related bankrupt business entities owned by the Debtors.³ Although the majority of the questions that Justice raises in his Objection are important to the court and should be addressed, they are strictly confirmation issues and, as such, they do not support his contention that the Second Amended Disclosure Statement does not contain adequate information as required by § 1125(a) and (b). Issues concerning the allegations both parties have made concerning the other should be addressed during confirmation, as should any questions as to whether the Second Amended Plan complies with the statutory requirements set forth in § 1129(a).

³ Chapter 11 bankruptcy cases are currently pending in the United States Bankruptcy Court for the Eastern District of Tennessee, Northern Division, for the following related business entities: (1) *In re Echota Development LP*, case no. 02-30998; and (2) *In re Great Smokies Management Corporation*, case no. 02-30999.

Moreover, Justice states that the Second Amended Disclosure Statement does not adequately contain (a) a description of the Debtors' available assets and their values, (b) the accounting and valuation methods used to produce the financial information in the Second Amended Disclosure Statement, (c) any financial information, valuations or *pro forma* projections that would be relevant to determinations of whether to accept or reject the plan, (d) information relevant to the risks being taken by the creditors and interest holders, (e) the future management of the Debtors' assets, (h) the sources of information stated in the Second Amended Disclosure Statement, and (i) the estimated administrative expenses, including attorneys' and accountants' fees. The court disagrees and finds that each of these issues is expressly addressed within the Second Amended Disclosure Statement.

Justice also objected based upon his assertion that the Debtors misspelled Justice's name and gave a phony mailing address for him; however, Justice is aware of the bankruptcy filing and has been participating in the process since at least March 6, 2003, the date upon which Justice filed a request for notices with the Bankruptcy Court Clerk's Office. Also, Justice states in his Objection that the Debtors have attempted to "paint Justice as a disgruntled ex-employee to impair his credibility with this Court." The court notes that Justice is not mentioned anywhere within the Second Amended Plan and/or Second Amended Disclosure Statement. Along those lines, Justice's claimed \$160,000.00 in past compensation is not provided for in the Second Amended Plan. The court believes that the Debtors need to disclose Justice's claim along with their proposed treatment thereof.

Additionally, the court agrees that the Debtors should disclose information regarding Echota Resort, LLC, and its successor-in-interest, Echota Smoky Mountain Resort, LLC. Most notably, the Debtors should disclose any former and present ownership interest in either of these entities, as well as advise whether they have received payments on account of either of these entities since the filing of their bankruptcy case. Likewise, the Debtors should disclose any payments and/or investments made for their benefit by Timothy Sievers, including payments made directly to the Debtors, payments to vendors and/or professionals for outstanding debts owed by the Debtors, and payments to insiders of the Debtors.⁴ It is the court's opinion that the Second Amended Disclosure Statement does not contain adequate information as required by § 1125(a) and (b) without this information.

IV

The Debtors will be directed to amend the Second Amended Disclosure Statement within ten days to include (1) Justice's claim for past due compensation as well as their proposed treatment of the claim; (2) specific information regarding any past and present ownership interest of the Debtors in either Echota Resort, LLC, or its successor-in-interest, Echota Smoky Mountain Resort, LLC; (3) specific information regarding any payments, salaries, dividends, and/or commissions that the Debtors have received on account of any past or present ownership interest in either of these business entities since the filing of their Chapter 11 bankruptcy case; and (4) specific information

⁴ The Bankruptcy Code defines "insider" as follows: "(A) if the debtor is an individual— (i) relative of the debtor or of a general partner of the debtor; (ii) partnership in which the debtor is a general partner; (iii) general partner of the debtor; or (iv) corporation of which the debtor is a director, officer, or person in control[.]" 11 U.S.C.A. § 101(31) (West 1993).

regarding any payments or investments made on the Debtors' behalf or for their benefit by Timothy Sievers, including payments made directly to the Debtors, payments made to other parties on their behalf, and/or payments made to any of the Debtors' insiders. Additionally, the Debtors will be directed to consolidate all modifications to the Second Amended Disclosure Statement into a single document.⁵

An order consistent with this Memorandum will be entered.

FILED: May 14, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

⁵ See *supra* n.1.

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 02-31000

COY LEE McCARTER
SUSAN RYMER McCARTER

Debtors

ORDER

For the reasons stated in the Memorandum on Adequacy of Debtors' Amended Disclosure Statement filed this date, the court directs the following:

1. The Objection of Commercial Bank to Adequacy of Disclosure Statement for First Amended Plan Proposed by Debtors, Coy Lee and Susan Rymer McCarter filed February 27, 2003, by Commercial Bank, and the Restated Objections to Amended Disclosure Statement for Second Amended Plan, Proposed by Debtors Coy Lee McCarter and Susan McCarter filed April 24, 2003, by John W. Holden, Jr. and Ken Rayburn, are OVERRULED.

2. The "Objection to Second Amended Disclosure Statement for Second Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code Coy Lee McCarter and Susan Rymer McCarter" filed April 11, 2003, by Joe Forest Justice, III, is OVERRULED in part and SUSTAINED in part.

3. The Debtors shall, within ten (10) days, further amend their Disclosure Statement for Second Amended Plan of Reorganization Dated April 3, 2003, Proposed by the Debtors Coy Lee and Susan Rymer McCarter in the manner and to the extent directed by the court in the accompanying Memorandum on Adequacy of Debtors' Amended Disclosure Statement. The final

disclosure statement shall incorporate all amendments to the April 3, 2003 disclosure statement into a single document.

4. Upon the filing of the final amended disclosure statement, the court will rule on the adequacy of the disclosure statement without further notice or hearing.

SO ORDERED.

ENTER: May 14, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE